

Decision 00-09-032 September 7, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition by Pac-West
Telecomm, Inc. (U-5266-C) for Arbitration of an
Interconnection Agreement with Roseville
Telephone Company (U-1015-C).

Application 00-05-021
(Filed May 12, 2000)

O P I N I O N

1. Summary

By this decision, we approve an interconnection agreement between Pac-West Telecomm, Inc. (Pac-West) and Roseville Telephone Company (Roseville). The parties filed this agreement in accordance with a Final Arbitrator's Report issued on July 31, 2000.

2. Procedural Background

Pac-West's petition for arbitration was filed on May 12, 2000, pursuant to Section 252 of the Telecommunications Act of 1996¹ (the Act) and Commission Resolution ALJ-178.² On June 6, Roseville filed its response. On June 13, the parties filed a joint statement of unresolved issues as required by Rule 3.7 of Resolution ALJ-178.

¹ Pub. L. 104-104, 110 Stat. 56 (codified as amended in various sections of Title 47, United States Code).

² Pac-West and Roseville have agreed for purposes of this proceeding that Pac-West made its request to negotiate an interconnection agreement on December 7, 1999.

An Initial Arbitration Meeting was conducted on June 21, pursuant to Rule 3.8 of the resolution. Only Pac-West and Roseville sought participation in this arbitration as parties. An evidentiary hearing was conducted on June 30, with briefs filed on July 7. The Draft Arbitrator's Report was filed on July 12, and comments were filed by the parties by July 24. The parties seek a Commission order by September 7, 2000, the deadline under federal law for resolving this arbitration.

A. Senate Bill 960 and Senate Bill 779

The schedule mandated for arbitrations pursuant to Section 252 of the Act are incompatible with the schedule and other procedural requirements of Senate Bill (SB) 960 (Ch. 856, Stats. 1996). The Act requires faster processing of petitions for arbitration and shorter intervals between steps than does SB 960, but retains comparable opportunities for Commissioner involvement. For these reasons, while the purposes behind SB 960 are fully supported, this arbitration will necessarily be conducted under the requirements of the Act and Resolution ALJ-178, rather than under the requirements established to implement SB 960.

This decision comes before the Commission after the effective date of SB 779 (Ch. 886, Stats. 1998). SB 779 among other things requires that, with certain exceptions, a Commission agenda item must be served on the parties and made available for public review and comment at least 30 days before the Commission may vote on the matter. (Pub. Util. Code § 311(g).) The Act requires that an interconnection agreement that has been adopted as a result of an arbitration must be approved or rejected by the Commission within 30 days after its submission by the parties. (47 C.F.R. § 252(e)(4).) This establishes a conflict between the requirements of the Act and of SB 779, which the Commission recognized in adopting its rules implementing SB 775. This matter

qualifies for waiver of the public review and comment period because it is “a decision under the state arbitration provisions of the federal Telecommunications Act of 1996.” (Rule 77.7(f)(5).)

3. Standard for Review

Pursuant to Section 252(e)(1) of the Telecommunications Act, an interconnection agreement adopted by negotiation or arbitration for operation in California must be submitted for approval to this Commission, which shall approve or reject the agreement, providing written findings as to any deficiencies. Grounds for rejection of an agreement reached as a result of arbitration conducted under Section 252(b) are limited to the Commission finding that the agreement does not meet the requirements of Section 251 of the Act, including the regulations prescribed by the Federal Communications Commission (FCC) pursuant to Section 251, or does not meet the standards set forth in Section 252(d), which relates to pricing standards.

The standards contained in Section 251 of the Act relate to the obligations of local exchange carriers like Roseville in responding to requests for negotiation and interconnection with carriers, like Pac-West, desiring access and interconnection.

4. Arbitrated Issues

Pac-West and Roseville had reached agreement on all issues except for three, all of them dealing with compensation for calls to Internet service provider (ISP) customers of Pac-West. Specifically, the three issues are:

1. Whether the parties should pay reciprocal compensation for local calls exchanged over their networks;
2. Whether the exchange of local dial-up traffic terminated to end-users that are enhanced service providers (i.e., ISPs,

paging companies, and certain other customers) should be subject to reciprocal compensation like other local dial-up calls;

3. Whether the payment of reciprocal compensation should be conditioned on the right of the originating carrier to bill the originating end-user for reciprocal compensation payments.

Essentially, the controversy is whether calls by Roseville's customers that are terminated by Pac-West to Pac-West's ISP customers should be subject to reciprocal compensation from Roseville to Pac-West. If reciprocal compensation is ordered, Roseville sought authority to pass those costs on to its customers who placed the ISP calls that were terminated by Pac-West.

5. Positions of the Parties

Pac-West witness John F. Sumpter, regulatory vice president, testified at arbitration that Pac-West will be performing call termination functions that Roseville otherwise would be required to perform were it terminating the same calls directly to ISPs. The parties have agreed on a reciprocal rate of \$0.002 per minute for terminating calls, which is the lowest of a range of rates for call termination authorized by the FCC. (47 C.F.R. § 51.707(b)(1).)

Sumpter stated that a major focus of Pac-West in California is the provision of call termination services to ISPs, paging companies, and other companies that generate large volumes of inbound calls. He states that through the use of advanced, non-blocking switching technology and efficient transport, his company is able to provide ISPs and other customers with high-quality inbound connections through local dial-up calls, permitting ISPs to serve end-users in geographically dispersed areas, including rural areas.

Sumpter stated his view that when, as here, one party will be terminating substantially more traffic than it originates, the Telecommunications Act requires that reciprocal compensation be paid unless the parties agree otherwise.

Roseville witness Greg R. Gierczak, regulatory executive director, testified that Roseville has been interconnected with Pac-West through an interim agreement since December 1996. The interconnection arrangements were established on a bill-and-keep basis, that is, with no reciprocal compensation and with each party bearing its own costs of terminating calls that originated with the other. Gierczak testified that virtually all of the traffic between Roseville and Pac-West is one-way traffic to Pac-West and its ISP customers.

According to Roseville, it has had to spend more than \$6.2 million in the past three years to upgrade its equipment to handle the volume of traffic going from Roseville to Pac-West and to other competitive local exchange carriers (CLECs) serving ISPs. Based on 1999 minutes of use, reciprocal compensation amounts due Pac-West would have been \$370,000 in that year, and would increase to \$540,000 in the year 2000. Meanwhile, Gierczak said, Roseville would have received reciprocal compensation from Pac-West of only \$600 based on 1999 minutes of use, and only \$1,500 for the year 2000.

Roseville estimated that if it were to pay reciprocal compensation at \$.002 per minute per terminated call to all CLECs to which it is connected, payments would have totaled \$1.2 million in 1999 and \$2 million in the year 2000. Gierczak said that Roseville has negotiated three interconnection agreements with carriers

similar to Pac-West.³ Two include bill-and-keep provisions. The third includes reciprocal compensation but excludes termination charges for Internet traffic.

6. Discussion

We uphold the findings of the Final Arbitrator's Report with respect to its resolution of reciprocal compensation for ISP-bound calls. We recognize, as did the Arbitrator, that the compensation standard for dealing with Internet telephone traffic is a matter that is now being considered by this Commission and by the FCC, and that any change in the current ISP policy should more appropriately be considered in those forums.

In Decision (D.) 98-10-057, the Commission decided that "reciprocal compensation provisions applicable to interconnection agreements should apply to the termination of calls to ISPs as they do to any other local calls."⁴ The Commission observed:

"The telecommunications network functions that are required to terminate ISP traffic are no different from the functions required to terminate local calls of any other end user....The fact that ISP traffic flows predominantly in one direction does not negate the costs involved in terminating traffic."⁵

Subsequently, the Commission revisited the issue in response to applications for rehearing filed by various incumbent local exchange carriers (ILECs). In so doing, the Commission considered the implications of a determination by the FCC that dial-up calls to ISPs are jurisdictionally interstate

³ The carriers are Teligent, Nextlink and Covad.

⁴ D.98-10-057, Conclusion of Law 3.

⁵ D.98-10-057, Findings of Fact 13 and 14.

and, therefore, not local calls.⁶ In its decision, the Commission acknowledged that its original rationale for asserting that calls to ISPs are local calls is inconsistent with the FCC's position; however, the Commission held that its earlier decision is nevertheless authorized, stating:

“Although our jurisdictional analysis is inconsistent with the FCC's Declaratory Ruling, the FCC's ruling does not require a different result with respect to our decision to treat ISP-bound calls as local for purposes of reciprocal compensation. As the FCC explicitly stated, the conclusion that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate ‘does not in itself determine whether reciprocal compensation is due in any particular instance.’”⁷

In addition, the Commission observed that while the basis for holding that such calls are local may have changed, the basis for requiring the payment of reciprocal compensation had not changed:

“We recognized [in D.98-10-057] that the CLCs perform a necessary function in terminating ISP traffic, thus enabling the communication to be completed. We further stated, ‘Absent a compensation agreement, the CLC terminating the ILEC customer's call receives no compensation for its termination. It is therefore equitable that the CLC be compensated through termination fees applicable to local calls.’”⁸

⁶ See, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (1999) CC Docket No. 96-98, Declaratory Ruling FCC 99-38 at ¶ 26 (the Declaratory Ruling).

⁷ D.99-07-047, at 8 (citation omitted).

⁸ *Id.*, at 12 (citation omitted).

The FCC in its Declaratory Ruling recognized that carriers “incur a cost when delivering traffic to an ISP that originates on another LEC’s network,”⁹ and, based on that, stated that “our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.”¹⁰

On March 24 of this year, the Court of Appeals for the D.C. Circuit vacated and remanded the FCC’s Declaratory Ruling, holding that the agency had failed to properly explain its basis for its jurisdictional treatment of calls delivered to ISPs.¹¹ In a public notice released on June 23, 2000, the FCC sought further comment regarding the conclusions in its Declaratory Ruling.¹²

Meanwhile, this Commission in February opened its Order Instituting Rulemaking (OIR) R. 00-02-005 for a comprehensive review of the issues relating to the payment of intercarrier compensation for calls to ISPs. However, the Commission’s order made clear that the policy established in D.98-10-057 would remain in effect until modified by further order:

“Current policy on reciprocal compensation adopted by the Commission in Decision (D.) 98-10-057 as modified by D.99-07-047, and in D.99-09-029 [relating to rating and routing of foreign exchange calls], will continue to be in effect

⁹ Declaratory Ruling, at ¶ 29.

¹⁰ *Id.*, at ¶ 25.

¹¹ *Bell Atlantic Telephone Companies v. FCC* (D.C. Cir., 2000) 206 F.3d 1.

¹² *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, FCC 00-227.

unaffected by this OIR until such time as the Commission determines otherwise. Any changes to current policy adopted in this OIR would be prospective only."¹³

Roseville argues that these developments, particularly the FCC's review of its Declaratory Order and the Commission's issuance of its OIR, justify a departure from the Commission's policy requiring the payment of reciprocal compensation for ISP traffic. It urges that the Commission require the parties to maintain the terms of their interim agreement (i.e., bill and keep) pending a further decision on ISP at the federal or state level. Roseville notes that the current schedule for the OIR calls for a Commission decision by November 21, 2000, while a decision in this arbitration is required by the Telecommunications Act to be issued by September 7, 2000, unless that date is extended by agreement of the parties.

We cannot accept Roseville's argument. The parties' interim agreement is not before us for approval. The proposed interconnection agreement is. In reviewing interconnection agreements, the Commission's policy requires the payment of reciprocal compensation for ISP traffic. The Commission considered and rejected suggestions that it abandon its policy in light of the FCC's Declaratory Ruling when it issued D.99-07-047, and it has reiterated that position in four subsequent decisions as well.¹⁴

¹³ R.00-02-005, at 1 (emphasis added).

¹⁴ See D.99-09-069, which approved an arbitrated interconnection agreement between Pacific Bell and MCI/WorldCom; D.99-12-025, which rejected an application for rehearing of an earlier decision approving an interconnection agreement between Pacific Bell and Pac-West; D.99-12-021, which approved an arbitrated interconnection agreement between Citizens and Pac-West; and D.00-03-024, which rejected Citizens' application for rehearing of D.99-12-021.

Therefore, unless and until we adopt a new policy in our rulemaking proceeding, or until the matter is otherwise decided at the federal level, the Commission's current policy requiring the payment of reciprocal compensation for ISP traffic remains in effect and will be followed here. The Commission's OIR and the FCC proceeding are the more appropriate forums in which to consider a change in policy on ISP compensation, particularly since a decision in the Commission proceeding is due within a few weeks.

We turn finally, and briefly, to Roseville's request that, if reciprocal compensation is required for ISP traffic, Roseville be permitted to pass those costs on to its customers who place ISP calls that are terminated by Pac-West. We agree with Pac-West that an arbitration proceeding under Section 252 of the Act is simply the wrong forum in which to address a charge that a carrier may impose on its own subscribers. Ratepayers have little opportunity to participate in an arbitration proceeding, which must be decided on an expedited basis that allows only minimal public notice. Moreover, there is a question (not decided here) as to whether Roseville's proposal conforms to the non-discriminatory interconnection standards imposed by the Telecommunications Act,¹⁵ since arguably it would impose termination charges on originating end-users when their call is terminated by Pac-West but not when the call is terminated on Roseville's own network connections.

¹⁵ Section 251(c)(2)(D) of the Act requires incumbent local exchange carriers, such as Roseville, to interconnect with other local carriers "on rates, terms and conditions that are just, reasonable, and nondiscriminatory."

Findings of Fact

1. The parties have agreed that for the purposes of this proceeding a request by Pac-West to negotiate an interconnection agreement under Section 252 of the Act was made on December 7, 1999.

2. Pac-West filed its petition for arbitration on May 12, 2000.

3. Roseville filed its response to Pac-West's petition on June 6, 2000.

4. A Commission decision by September 7, 2000, would satisfy the statutory deadline for a decision in this arbitration proceeding.

5. In the Joint Statement of Unresolved Issues filed on June 13, 2000, the parties identified the following three issues requiring resolution by the Commission:

- (a) Whether reciprocal compensation should be paid for local calls;
- (b) Whether local switched (dial-up) traffic terminated to enhanced service providers, which Roseville defines as including providers of access to the Internet and access to paging services, should be subject to the same provisions for reciprocal compensation that are applicable to other local dial-up calls; and
- (c) If the Commission orders reciprocal compensation to be paid in this proceeding, whether Roseville is authorized to pass through the reciprocal compensation charges to those Roseville end users who actually originate the calls to Pac-West's network.

6. The parties have agreed on all other provisions of the agreement, including the rate that should be paid in the event that the Commission orders reciprocal compensation to be paid.

7. The parties are currently exchanging local traffic pursuant to bill-and-keep arrangements established by an interim agreement that has not been filed with the Commission.

8. It is likely that the flow of local traffic between Pac-West and Roseville will not be in balance.

9. Roseville does not assess an explicit call termination charge on end-users who originate calls to Internet service providers or other end-users that are completed on Roseville's network.

10. The Commission has pending before it a rulemaking to determine, among other things, whether calls to ISPs should be subject to reciprocal compensation.

Conclusions of Law

1. The petition for arbitration was filed in accordance with the timeframe for such filings established by the Telecommunications Act.

2. The Commission's existing policy requires the payment of reciprocal compensation for local calls to ISPs.

3. Until otherwise required by order of this Commission or at the federal level, all local calls exchanged by parties under an arbitrated interconnection agreement, including calls to ISPs, should be subject to reciprocal compensation.

4. Roseville should not be authorized to pass through reciprocal compensation charges to Roseville end-users who originate calls to Pac-West's network.

5. Arbitration of interconnection agreements is conducted under procedural requirements of Section 252 of the Act, which generally requires faster processing times than those required by SB 960 or SB 779.

6. Waiving public review is authorized by Rule 77.7(f)(5) of the Rules of Practice and Procedure.

O R D E R

IT IS ORDERED that:

1. The fully executed arbitrated interconnection agreement filed on August 7, 2000, in response to the Final Arbitrator's Report dated July 31, 2000, between Pac-West Telecomm, Inc., and Roseville Telephone Company is approved pursuant to the requirements of the Telecommunications Act of 1996 and is effective as of the date of this order.
2. The parties shall within 10 days provide to the Director of the Telecommunications Division a copy of the executed agreement.
3. Application 00-05-021 is closed.

This order is effective today.

Dated September 7, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners